BAKHARI ISMAIL *a*

v.

ZULKIFLI ABU SAMAN

HIGH COURT MALAYA, PULAU PINANG *b*
ZALEHA ZAHARI J
[CIVIL APPEAL NO: 12-90-91]
7 JUNE 2000

DAMAGES: *Personal injuries - Loss of future earnings - Deduction of living expenses - Whether deduction of living expenses must be considered in awarding loss of future earnings* *c*

DAMAGES: *Quantum - Future loss of earnings - Deduction of living expenses - Whether deduction of living expenses should be considered*

This is an appeal against an award relating to quantum made by the Sessions Court Judge ('SCJ') in respect of general damages and in respect of loss of future earnings which was awarded to the respondent for injuries sustained by him arising from a motor accident. *d*

On the main issue of the appeal, the SCJ calculated and made an award for loss of future earnings based on 151 months at RM182 a month amounting to a total sum of RM27,482. *e*

The appellant's submission was that there was no loss of earnings of the respondent as a welder. Alternatively, even if there was such a loss of earnings, an appropriate deduction should be made in respect of living expenses. *f*

The respondent submitted that the court must give due regard to the words "as is proved or admitted to be the living expenses of the plaintiff". On the evidence presented, the living expenses of the respondent had not been proved neither was it admitted. *g*

Held:

[1] The average income of the respondent per month at the time of the accident was RM450 per month. The plaintiff testified that he was unable to work as a welder arising from injuries sustained and was now working in a radio manufacturing business and his income is only RM11 a day. *h*

i

[2] The SCJ in this case had applied a multiplicand of RM182, which is the difference between the respondent's income as a welder, with his income in his current employment.

[3] A deduction of 1/7 of RM182 (*ie*, a deduction of RM25) a month must be made in respect of living expenses of the respondent.

[Appeal allowed.]

Case(s) referred to:
Chua Phek Chin v. Chai Chin & Anor [1984] 1 MLJ 70 ***(refd)***
Lee Hock Leong & Anor v. Chua Leng Hock [1988] 2 MLJ 49 ***(refd)***
Norma Semawi & Anor v. Zaini Jaafar & Anor [1984] 1 MLJ 70 ***(refd)***
Soo Wai Seng v. Tan Kim Lock [1986] 2 MLJ 61 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(d)(I)

For the appellant - Amaleena Maikal Jasu; M/s Salina Lim Kim Chuan & Co
For the respondent - Baldev Singh Bhar & Advoc; M/s Syarikat Baldev Bhar

Reported by Yow Ting Fong

JUDGMENT

Zaleha Zahari J:

This is an appeal against an award relating to quantum made by the Sessions Court Judge (HMS) issued on 13 September 1991 in respect of general damages and in respect of loss of future earnings which was awarded to the respondent for injuries sustained by him arising from a motor accident.

I propose to deal with the arguments in this appeal under the following headings:

1. Scarring
2. Tibia and Fibula
3. Clavicle
4. Giddiness
5. Future Operation
6. Loss of Future Earnings

Scarring

The HMS awarded RM5,000 for scarring.

Counsel for appellant contended that the award was too high, that a sum of RM2500 sufficed in the light of the fact that the scars were not on the face but on the shoulder and hand. The case of *Soo Wai Seng v. Tan Kim Lock* [1986] 2 MLJ 61, 64 was cited as authority.

The respondent counsel however submitted that the award of RM5,000 was appropriate in the light of the fact that no award was made in respect of lacerations.

Finding: On the authorities presented before me I agree the award of RM5,000 for scarring was excessive and therefore reduced this sum to RM4,000.

Tibia And Fibula

The HMS awarded a sum of RM9,000 to the plaintiff based on authorities for the fracture of both the tibia and fibula.

It was argued on behalf of the appellant that, as on the facts of this case only the tibia was broken and not the fibula, the HMS erred in basing her assessment on authorities of the fracture of both, the tibia as well as the fibula. The court, in these circumstances, was urged to reduce the sum awarded by half to between RM3,000 - RM4,000 based on the authority of *Norma bte Semawi & Anor. v. Zaini bin Jaafar & Anor.* [1984] 1 MLJ 70.

Counsel for the respondent, whilst conceding that the tibia was not broken in this case, was nevertheless of the view the sum of RM9,000 awarded by the HMS was appropriate.

Finding: It was clear that the HMS based her assessment on authorities of the fracture of both the tibia and fibula. In the light of the fact that only the tibia is fractured, and not the fibula, I hold that the amount of RM9,000 awarded was excessive. The amount awarded for this injury was accordingly set aside and substituted with an award of RM5,000.

Clavicle

The HMS awarded RM6000 for this injury.

Counsel for the appellant drew the court's attention to the specialist report at p. 103 of the Appeal Record where it was reported that the fracture had united well and the muscle power of the respondent was of grade 5/5, which is normal. Further, at p. 57 para. E of the Appeal Record, SDI had testified that this injury did not affect the manual movement of the girdle. In these circumstances she submitted that an award of RM3,000 for this injury sufficed.

The respondent's counsel submitted that the award made of RM6,000 made by the HMS in respect of this injury was correct. The case of *Chua Phek Chin v. Chai Chin & Anor*. [1984] 1 MLJ 70, was cited as authority.

Finding: I agree that the award of RM6,000 made by the HMS was appropriate for this injury and therefore confirmed this award.

Giddiness

The HMS awarded RM3,000 for giddiness.

On this issue the appellant's counsel submitted that a party was bound by his pleadings. She was of the view that the HMS was wrong in awarding this sum of RM3,000 as this item had not been pleaded in the plaintiff's statement of claim.

The respondent's counsel response was that as the appellant's counsel had failed to make any submission on this issue in the lower court she cannot complain now. According to him there was evidence that the respondent did in fact suffer from giddiness. The award of RM3,000 made by the HMS was, according to him, fair. Reliance was placed on the case of *Lee Hock Leong & Anor. v. Chua Leng Hock* [1988] 2 MLJ 49 in respect of the quantum awarded.

Finding: I agree with the submission of counsel for the appellant that a party is bound by his pleadings and that as this was not pleaded by the respondent in his statement of claim the HMS erred in awarding this sum. In these circumstances the award of RM3,000 is hereby set aside.

Future Operation

The HMS awarded the sum of RM800 for future operation.

The appellant's counsel submitted that this award was inconsistent with the evidence adduced in court. The court's attention was drawn to p. 56 para. D of the appeal record where only a sum of RM400 to RM500 was held out to be the appropriate sum, and not RM800 as assessed by HMS.

On the part of the respondent it was submitted that as there was not much difference between the amount RM400-RM500 adduced in court as contrasted with the amount awarded by the HMS, the sum of RM800 made should be retained.

Finding: I agree with the submission of the appellant's counsel on this item that the decision must be consistent with the evidence adduced. The award of RM800 was clearly inconsistent with the evidence adduced. Be that as it may, by reason of the period that has since lapsed, taking into

consideration the element of inflation, I am of the view that a sum of RM600 was appropriate and therefore directed that the sum of RM800 be substituted with the sum of RM600.

Loss Of Future Earnings

This is the main issue in this appeal. The HMS calculated and made an award for loss of future earnings based on 151 months at RM182 a month amounting to a total sum of RM27,482.

(a) The Multiplier

It would appear that the HMS based her computation on the age of the respondent at the date of the accident, ie, 19 years, and applying s. 28A(2)(d)(I) Civil Law Act 1956 ("the Act") the multiplier applicable to a person of that age would be 16 years.

I hold that in the circumstances of this case the HMS was right in applying a multiplier of 16 years in assessing the loss of future earnings.

(b) The Multiplicand

From the evidence adduced the average income of the respondent per month at the time of the accident was RM450 a month. The plaintiff testified that he was unable to work as a welder arising from injuries sustained and was now working in a radio manufacturing business and his income is only RM11 a day.

The HMS in this case had applied a multiplicand of RM182 which is the difference between the respondent's income as a welder, with his income in his current employment, ie, RM7 a day x 26 days = RM182 a month.

The appellant's counsel submission was that there was no loss of earnings of the respondent as a welder. Alternatively, she submitted that, that even if there was such a loss of earnings, an appropriate deduction should be made in respect of living expenses. She urged the court to amend the award made by deducting 1/5 of the earnings, ie, RM30 a month, from the RM182 which was awarded.

On the part of the respondent it was submitted that the HMS had not erred in awarding the sum that he did in respect of loss of future earnings. On the issue of deduction for living expenses, according to the respondent's counsel the court must give due regard to the words "as is proved or admitted to be the living expenses of the plaintiff'. According to him, on the evidence presented, the living expenses of the respondent had not been proved neither was it admitted.

Findings: I hold that a deduction of 1/7 of RM182 (ie, a deduction of RM25) a month must be made in respect of living expenses of the respondent which works out to be 151 x RM157 = RM23,707.

In these circumstances the award of RM27,482 for loss of future earnings is hereby set aside and substituted with a sum of RM23,707 instead.

The appeal was accordingly allowed to the extent enumerated above with costs to the appellant.